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IN THE

Supreme Court of the United States

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October Term, 1947.

Sup. Ct.

No. 302

SWIFT & COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

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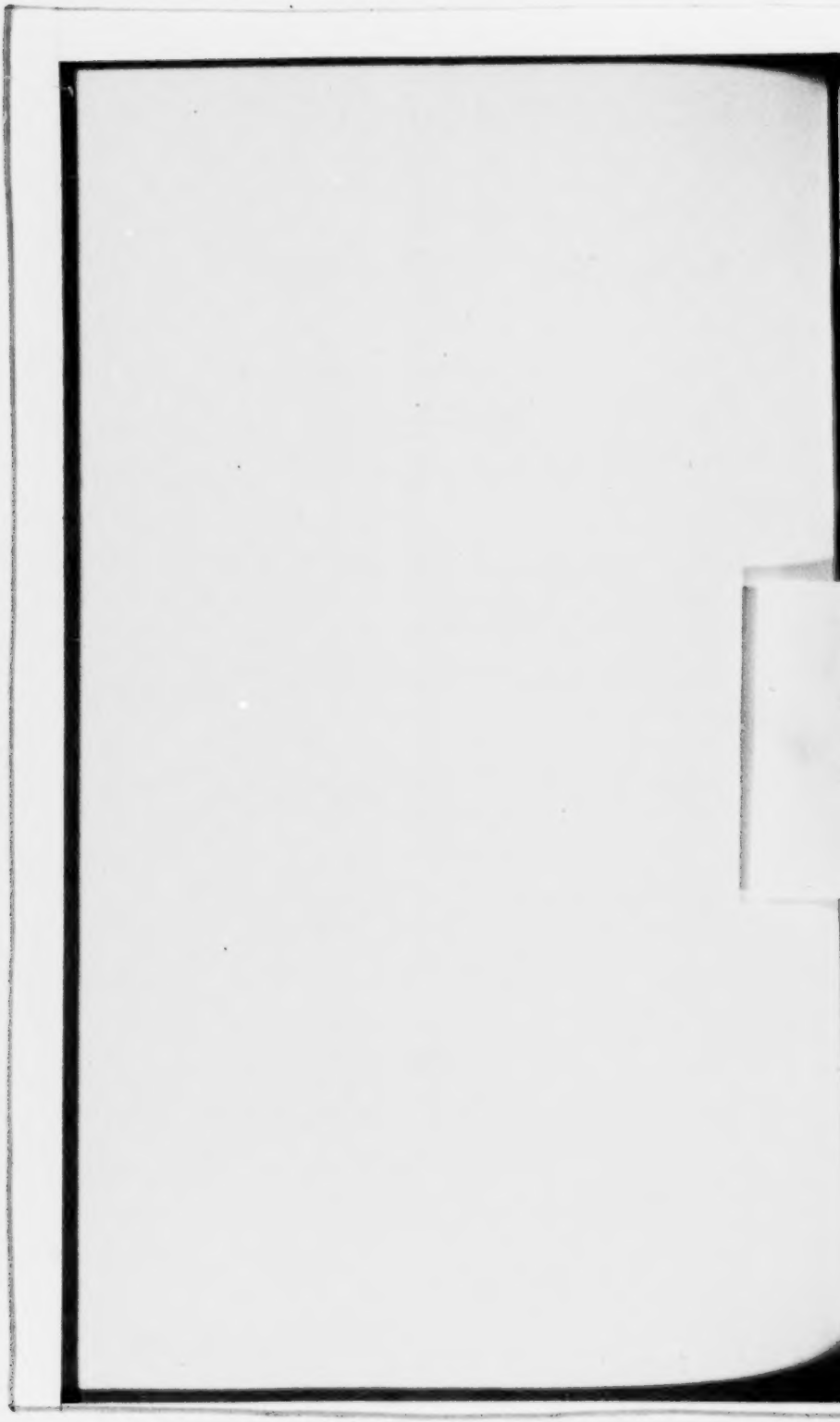

INDEX TO PETITION.

INDEX TO BRIEF

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

TABLE OF CASES CITED (Continued).

MISCELLANEOUS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947. No. .

SWIFT & COMPANY,
Petitioner and Respondent below,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent and Petitioner below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Swift & Company, respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Only one issue is presented to this Court in this case,—whether an employer who, solely to test the legality of the Board's determination, has refused to bargain collectively with a union certified by the National Labor Relations Board, but has committed no other unfair labor practice, should be compelled to bargain collectively with the union three years after the certification when, through changes in personnel occurring in the normal course of business, the union has admittedly ceased to represent a majority of the employes involved.

This case came before the Circuit Court of Appeals for the Third Circuit upon petition of the National Labor Relations Board (hereinafter called the Board) pursuant to Section 10 (e) of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 453, 29 U. S. C. A. Sec. 160 (e), for enforcement of its order issued against Swift & Company on August 31, 1945, and upon Swift & Company's answer thereto. The Board's petition was the culmination of a series of events of which the following is a summary.

On April 28, 1943, Swift & Company entered into an agreement with Packinghouse Workers Organizing Committee, C. I. O., Local 221 (hereinafter referred to as United Packinghouse Workers or as Union) and an independent union, providing for a consent election covering the production and maintenance employes at the company's meat packing plant in Jersey City, New Jersey (R. 24). Pursuant to this agreement, the Board conducted an election on May 4, 1943, which resulted in certification of United Packinghouse Workers of America, C. I. O., Local 221, as the collective bargaining representative for these employes (R. 25).

Following this election, the company entered into an agreement with Local 221, by the terms of which the company's master agreement, covering other plants of the company in which the United Packinghouse Workers of America represented production employes, was applied to the production and maintenance employes at the Jersey City plant. The company has continued to deal with Local 221 as the exclusive bargaining agent of these employes (R. 25).

On December 2, 1943, the company and Local 49-A, United Packinghouse Workers of America, entered into an agreement for a consent election covering watchmen, box pullers, and a matron at the company's Jersey City plant. Following an election, Local 49-A was certified and there-

after was recognized by the company as the exclusive bargaining representative of these employes (R. 25-26).

Shortly prior to December 2, 1943, representatives of the Union,—mostly members of Local 221 in the company's Jersey City plant,—engaged in organizational activities among certain classifications of employes at this plant excluded by agreement from the units in the foregoing consent elections (R. 23, 27). The Union made a claim of representation of these employes, and on or about December 2, 1943 (the very date on which an agreement was executed for a consent election as to another unit), Local 49-A filed its representation petition with the Board (R. 1).

On January 24, 1944, the Board ordered a hearing which was held before a Trial Examiner on February 16, 1944 (R. 20). On April 29, 1944, the Board issued a Decision and Direction of Election in which it found that the appropriate unit for purposes of collective bargaining was as follows (R. 15):

> "• • • all plant clerks, standards department checkers, storeroom clerks and commissary employees of the Company's Jersey City plant, exclusive of time and employment office employees, time-study employees, storeroom laborer, head storekeeper, chief clerk, fire marshal, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action • • •."

On May 24, 1944, an election was conducted, and the Board later issued a certification of representation in which it found that of approximately 29 eligible voters, 23 cast valid votes, of which 20 were for the United Packinghouse Workers, Local 49-A, and 3 against it (R. 17-18).

A Union representative testified that if the Board should certify Local 49-A as bargaining representative of the persons comprising the alleged unit, it was the

Union's intention to ask that the employes in that unit be included in Local 221, which represents the company's production and maintenance workers (R. 30). Following the election, the Union requested that the employes in the alleged unit be included under the master contract covering production and maintenance employes (R. 155).

The company took the position that the unit included individuals who are part of management and whose duties are supervisory in character, so that they are not "employes" under the Act; that, in any event, they should not be represented by the same union as the company's production employes; and, finally, that the classifications in the purported unit were too heterogeneous to constitute a valid unit. In order to test the validity of the Board's unit determination, the company refused to bargain with Local 49-A as the representative of the employes comprising the alleged unit (R. 158-159). Thereupon, the Board issued a complaint against the company (R. 104), and on March 21 and 22, 1945, hearings were held before a Trial Examiner (R. 135, 193).

On August 31, 1945, the Board issued its Decision and Order in which it adopted the findings of fact, conclusions of law, and recommendations of the Trial Examiner's Intermediate Report of April 6, 1945, and ordered the company, among other things, to bargain collectively with Local 49-A upon request (R. 115-118). For the reasons stated, the company continued to refuse to do so.

The Board did not file its petition for enforcement of its order and a transcript of the record in the representation and the complaint proceedings until September 12, 1946 (R. 238).

The company's answer, filed on October 2, 1946, raised a number of objections to the Board's order and to the conduct of proceedings before the Board (R. 243).

However, on November 14, 1946, before the Company's brief on these issues was due for filing, a communication was presented to Mr. W. R. Moffat, Superintendent of the Jersey City plant of the company. This communication reads as follows:

> "We the undersigned plant clerks and checkers do hearby (*sic*) state, that we do not wish to be represented by unionism in this plant."

The communication was signed by 20 of the 25 persons in the positions comprising the unit which the Board found appropriate in its decision of April 29, 1944.

In view of this communication, the company, on November 25, 1946, filed a motion for leave to adduce additional evidence material to this cause, under Section 10 (e) of the Act (29 U. S. C. A. sec. 160 (e)) (R. 249).

In its motion, Swift & Company averred that of the 20 persons who signed the above communication, 13 were not on the payroll of the company at the time of the election on May 24, 1944. Of these, 9 were former employes who were serving in the armed forces of the United States at the time of the election and who have since returned to the company's staff. (Seven of these 9 occupied positions which would have rendered them eligible to vote at the time of the election if they had not been in military service. Two of them occupied such positions since their return from military service.) Another of these 13 persons was in the employ of the company at the time of the election but was not in the alleged unit and was therefore ineligible to vote. He has since been transferred into a position which places him within the alleged unit. Two additional persons in this group of 13 were hired by the company and one was transferred to its Jersey City plant since the election and after all hearings were concluded in these proceedings. The remaining 7 of the 20 persons who signed the

communication were eligible to vote in the election of May 24, 1944 (R. 252).

The Board has not questioned the company's averment that the foregoing changes in personnel occurred in the normal course of business. Most of them were caused by the replacement of women,—who had temporarily occupied these positions during the war,—by men.

Swift & Company contended that, aside from the other reasons it had been presenting for denying enforcement of the Board's order, the purposes of the National Labor Relations Act would not be served by compelling the company to bargain with a union as the sole representative of its employes in complete disregard of the wishes of the majority of these employes. Accordingly, the company moved the Court to direct the Board to take testimony regarding the newly-occurring facts and, on the basis thereof, to determine whether a majority of the alleged unit now desired to be represented by Local 49-A or any other union, whether an election should be held, and whether the company should be ordered to bargain collectively with Local 49-A as the exclusive representative of these employes (R. 253-254).

At the oral argument, counsel for the Board stated that he had been authorized by the Board to say that, assuming all the facts averred by the company were established by evidence adduced at a hearing, the Board's decision and order would remain unchanged (R. 266). Accordingly, by an order dated December 20, 1946, the Court deferred ruling on the company's motion, but directed the parties to present, at the argument on the Board's petition for enforcement, argument on the legal point presented by the motion as though the motion had been granted and the evidence had been adduced in accordance therewith (R. 267).

On February 18, 1947, argument was heard by the Court below both on the merits of the Board's petition and on the company's argument that the Union's loss of majority status in the unit should prevent enforcement of the Board's order, in the absence of any alleged unfair labor practice except a refusal to bargain, persisted in solely in order to test the Board's determinations.

On June 11, 1947, the Court below, by Circuit Judge Kalodner, issued its opinion (R. 269), and on June 26, 1947, the Court issued its decree enforcing the Board's order as modified (R. 289).

The Court held that the company's plant clerks and standards checkers at its Jersey City plant were employes within the meaning of the Act, that they may be represented by a union which is a coaffiliate of the union now representing the company's production and maintenance employes, and that the Board's determination of an appropriate unit for purposes of collective bargaining was supported by substantial evidence and was a reasonable exercise of the Board's discretion (R. 273-278).

In view of recent opinions by this Court, issued since the oral argument in the Court below (**Packard Motor Car Company v. National Labor Relations Board,** 91 Sup. Ct. (L. Ed.) 697; **National Labor Relations Board v. E. C. Atkins & Company,** 91 Sup. Ct. (L. Ed.) 1157; **National Labor Relations Board v. Jones & Laughlin Steel Corporation,** 91 Sup. Ct. (L. Ed.) 1167), your petitioner does not now press its prior position on any of the points referred to in the preceding paragraph.

As to the sole issue raised by this petition, the Court below held that the Board was within its statutory authority in requiring the respondent to bargain collectively with the Union despite the Union's loss of majority status due to re-employment of veterans and other changes in personnel in the normal course of business, without any interference,

coercion, or even suggestion on the part of the company (R. 278-284). In deciding this point, the Court below relied principally on **International Association of Machinists et al. v. National Labor Relations Board,** 311 U. S. 72 (1940); **Franks Bros. Co. v. National Labor Relations Board,** 321 U. S. 702 (1944) **Oughton et al. v. National Labor Relations Board,** 118 F. (2d) 486 (C. C. A. 3rd, 1940, rehearing 1941); **Semi-Steel Casting Company of St. Louis v. National Labor Relations Board,** 160 F. (2d) 388 (C. C. A. 8th, decided March 13, 1947); and **National Labor Relations Board v. Central Dispensary & Emergency Hospital,** 145 F. (2d) 852 (App. D. C., 1944), cert. denied, 324 U. S. 847 (1945).

The company relied principally upon **National Labor Relations Board v. Inter-City Advertising Co., Inc.,** 154 F. (2d) 244 (C. C. A. 4th, 1946), where the Board's petition for enforcement was denied because of the union's loss of majority status where the company's sole alleged unfair labor practice was a refusal to bargain in order to test the Board's unit determination. As to the latter decision, the Court below stated (R. 283):

> "The respondent relies on National Labor Relations Board v. Inter-City Advertising Company, 154 F. (2d) 244, where the United States Circuit Court of Appeals for the Fourth Circuit denied the Board's petition for enforcement. While the petitioner has stressed several distinguishing factors we need only say that **we are not in accord with the majority view in the Inter-City case** and agree instead with the views expressed by Judge Dobie in his dissenting opinion." (Emphasis supplied.)

Your petitioner respectfully urges, as it did in the Court below, that the **Inter-City Advertising** Case is the only decision on all fours with the facts in the instant case, that it declares the proper rule of law to be applied in the present situation, and that the decisions relied upon by the Court

below, as well as others advanced by the Board, are distinguishable from the present case.

Finally, the Court below held that paragraph 1 (b) of the Board's order, directing the company to cease and desist from "engaging in any like or related act or conduct interfering with, restraining, or coercing its employees", etc., should be stricken from the order, since in the Board's complaint against the company "the only substantive charge was that it refused to bargain collectively with the Union", and "the record fails to disclose any evidence of any criticizable conduct on the part of the respondent" (R. 288).

Your petitioner concurs in the ruling of the Court below on this point.

On July 1, 1947, the Court below stayed execution and enforcement of its decree for 30 days to permit your petitioner to apply to this Court for a writ of certiorari and, upon notification by the Clerk of this Court that such application had been perfected within the said 30-day period, the stay was to be extended until final disposition of the case by this Court (R. 295-296). On July 28, 1947, a stipulation of counsel extending the foregoing stay to September 1, 1947, and thereafter, upon the same conditions, was approved by the Court below.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the decree here in question under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937, 28 U. S. C. A. sec. 347, and under Section 10 (e) of the National Labor Relations Act, *supra,* 29 U. S. C. A. sec. 160 (e).

The jurisdiction of this Court is invoked for the purpose of determining whether the Circuit Court of Appeals erred in refusing to give effect to the Union's loss of ma-

jority status where the company was admittedly guilty of no anti-union conduct. This Court has previously taken jurisdiction of cases involving an employer's duty to bargain with a union which no longer represented a majority of the company's employes. **Franks Bros. Co. v. National Labor Relations Board**, *supra;* **International Association of Machinists et al. v. National Labor Relations Board**, *supra.* Your petitioner contends, however, that the circumstances of the present case differ materially from those in the cited decisions or any other decisions of this Court, and justify reversal of the decree of the Court below.

STATUTE INVOLVED.

The statute involved is the National Labor Relations Act, which we have here referred to as "the Act" (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A. sec. 151 et seq.). The pertinent provisions of the Act are: The last paragraph of Section 1; Section 7; Section 9; Section 10 (e) and (f). Because of the length of these provisions, we shall set them forth in an appendix.

QUESTION PRESENTED.

Should an order of the Board requiring an employer to bargain collectively with a union as the exclusive representative of the company's employes in a determined unit be enforced when an overwhelming majority of the persons comprising the unit, most of whom had no opportunity to vote in a Board election conducted over three years ago, have expressed a desire to be represented by no union, and when the only unfair labor practice committed by the employer was a refusal to bargain with the union in order to contest the legal validity of the unit determined to be appropriate by the Board?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds, namely:

1. This case presents a single question of primary importance under the National Labor Relations Act of 1935, *supra,* as to which the opinion of the Court below squarely recognizes a conflict between the Circuit Court of Appeals for the Third Circuit and the Circuit Court of Appeals for the Fourth Circuit. The resolution of such a conflict is, of course, a basic ground for granting the writ here prayed for. **National Labor Relations Board v. E. C. Atkins & Company**, 91 Sup. Ct. (L. Ed.) 1157, 1159 (1947); see Frankfurter and Hart, **"The Business of the Supreme Court at October Term, 1933,"** 48 **Harv. L. Rev.** 238, 267 (1934).

2. The problem here presented is an important question in the administration of the National Labor Relations Act of 1935, *supra,* which has not been, but should be, settled by this Court. **Reconstruction Finance Corporation v. Bankers Trust Co., Trustee**, 318 U. S. 163, 166 (1943); **Clearfield Trust Co. et al. v. United States**, 318 U. S. 363, 366 (1943); see Frankfurter and Hart, *supra,* 48 **Harv. L. Rev.** 238, 271. The question involved in this case is a novel one in this Court; your petitioner contends that the decisions of this Court relied on by the Court below are distinguishable and inapplicable.

3. The Court below erred in rejecting petitioner's contention that under the Act it could test the validity of the Board's determinations and orders in the representation and complaint proceedings only by refusing to bargain with the Union and in holding, in effect, that petitioner was

bound to seek review of the Board's order under section 10 (f) of the Act rather than to abide action by the Board to seek enforcement of its order under Section 10 (e) of the Act.

4. Under Sections 1 and 7 of the National Labor Relations Act of 1935, *supra,* your petitioner's employes are guaranteed the right to bargain collectively through "representatives of their own choosing". Here it has been established that an overwhelming majority of the employes involved do not desire to be represented by the Union for purposes of collective bargaining. Their decision was in no way influenced by the company. The loss in majority status could not have been caused by the company's technical violation of the Act in view of the absence of any anti-union conduct by the company and of the company's recognition of the Union as the exclusive representative of hundreds of employes,—virtually all it has sought to represent,—in the company's plant here involved, and many thousands of the company's employes in other plants. Under these circumstances, your petitioner contends that to compel the employes here involved to be represented by the Union for purposes of collective bargaining would negate and stultify the most basic purpose for which the Act was passed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 9228, National Labor Relations Board, Petitioner v. Swift & Company, Respondent, and that the decree of the Circuit Court of Appeals be reversed by this

Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet.

SWIFT & COMPANY, *Petitioner,*

By WM. A. SCHNADER,
BERNARD G. SEGAL,
IRVING R. SEGAL,
Counsel for Petitioner.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

Portions of National Labor Relations Act (Act of July 5, 1935, c. 372, 29 U. S. C. A. Sec. 151 et seq.) Relied Upon

Section 1 (29 U. S. C. A. Sec. 151).

* * * It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 (29 U. S. C. A. Sec. 157).

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Section 9 (29 U. S. C. A. Sec. 159).

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual em-

ployee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of sections 151-166 of this title, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 160 of this title or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under sections 160 (e) or 160 (f) of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 (e) and (f) (29 U. S. C. A. Sec. 160 (e) and (f)).

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United

States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the district court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file

such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947. No. .

SWIFT & COMPANY,
Petitioner and Respondent below,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Petitioner below.

Brief in Support of Petition for Writ of Certiorari.

I.
OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Third Circuit was handed down on June 11, 1947, and is as yet unreported.

II.
JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937, 28 U. S. C. A. Section 347, and under Section 10 (e) of the National Labor Relations Act of July 5, 1935, 49 Stat. 453, 29 U. S. C. A. Section 160 (e).

2. The decree of the United States Circuit Court of Appeals for the Third Circuit, which petitioner seeks to have reviewed, was dated June 26, 1947 and was filed on that day.

III.

STATEMENT OF THE CASE.

A rather full statement of the case has been given in the Petition under the heading "Summary Statement of the Matter Involved", and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERROR.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that petitioner was required to bargain collectively with a union as the exclusive representative of employes in a determined unit even though 80 per cent of the employes in the unit have voluntarily expressed a desire to be represented by no union (a majority of them and of the whole unit never having had an opportunity to vote in an election conducted by the Board two and one half years earlier) and even though the petitioner was never charged with any anti-union conduct but refused to bargain with the certified union solely to test the validity of the Board's unit determination.

V.

ARGUMENT.

A. Decisions relied on by the court below are inapposite.

B. National Labor Relations Board v. Inter-City Advertising Co., Inc., 154 F. (2d) 244 (C. C. A. 4th, 1946), is the only decision properly applicable to the present case.

C. Petitioner should not be penalized for adopting a procedure permitted by the Act.

A.

Decisions Relied On by the Court Below Are Inapposite.

The Circuit Court of Appeals relied principally on two decisions of this Court: **International Association of Machinists, et al. v. National Labor Relations Board**, 311 U. S. 72 (1940) and **Franks Bros. Co. v. National Labor Relations Board**, 321 U. S. 702 (1944). Both of these decisions are distinguishable.

A brief statement of the salient facts in the **Machinists** Case reveals its inapplicability to the instant situation.

The **Machinists** Case was a complaint proceeding under Section 10 of the National Labor Relations Act (29 U. S. C. A. sec. 160). The employer had done its best to foster the petitioning unions (hereinafter referred to collectively as "A. F. L.") and to impede the United Automobile Workers of America (hereinafter referred to as "U. A. W."). Nevertheless, on August 10, 1937, the U. A. W. had a clear majority of all employes and presented a collective bargaining agreement to the employer, who refused to sign it. On August 11, 1937, the employer signed a closed-shop contract with the A. F. L. for its toolroom employes, a majority of whom had apparently been signed up by the A. F. L. by July 28, 1937. Thereafter, the Board filed its complaint against the employer. After hearings and the usual pro-

cedure, the Board ordered the employer to cease and desist its discriminatory practices against U. A. W. and in favor of A. F. L., to reinstate discriminatorily discharged employes, to cease giving effect to the closed-shop contract with A. F. L. covering toolroom employes, and to deal with U. A. W. as the exclusive agent of its employes, including the toolroom employes. On July 23, 1938, four days prior to the issuance of the Board's order, the A. F. L. notified the Board that it then represented a majority of the production employes, the majority having shifted from U. A. W. to A. F. L. since the end of hearings on the complaint. The Board refused to defer its decision pending an election.

Both the Court of Appeals for the District of Columbia and this Court sustained the Board in this action. This Court stressed the open hostility of the employer toward U. A. W. and its assistance to A. F. L. The Court therefore held that it was for the Board to determine how the effect of the employer's unfair labor practices might be expunged.

In this respect, the **Machinists** decision is at the head of a long list of cases cited by the Board in its various briefs, in all of which the employer was guilty of active anti-union conduct, discrimination, interference with the collective bargaining rights of employes, and similar misconduct.* It is no different from the other decision relied on by the Court below,—the **Franks Bros.** Case,—in which this Court pointed out that the employer had "conducted an aggressive campaign against the Union, even to the extent of threatening to close its factory if the Union won the elec-

* The list is too long to cite in full in this brief. See, e. g., **Great Southern Trucking Co. v. National Labor Relations Board,** 139 F. (2d) 984 (C. C. A. 4th, 1944); **National Labor Relations Board v. Poultrymen's Service Corporation,** 138 F. (2d) 204 (C. C. A. 3rd, 1943); **National Labor Relations Board v. Somerset Shoe Co.,** 111 F. (2d) 681 (C. C. A. 1st, 1940); **National Labor Relations Board v. Century Oxford Mfg. Corporation,** 140 F. (2d) 541 (C. C. A. 2d, 1944); **National Labor Relations Board v. Burke Mach. Tool Co.,** 133 F. (2d) 618 (C. C. A. 6th, 1943); **Matter of Karp Metal Products Co., Inc.,** 51 N. L. R. B. 621 (1943) (cited by Court below).

tion" (321 U. S. at p. 703). This Court ruled similarly under similar circumstances in **National Labor Relations Board v. P. Lorillard Co.**, 314 U. S. 512 (1942).

In all these cases, it was reasonable to presume that the union's loss of a majority was materially aided, if not entirely caused, by the employer's active interference with its employes in their right of self-determination of bargaining representatives.

By way of contrast, it is perfectly clear that Swift & Company in the present case was charged with no unfair labor practices except a technical refusal to bargain with the Union. The only reason for this refusal was to obtain a judicial determination of the validity of the alleged unit. The Union, as well as the Board, understood perfectly the reason for the company's position as to non-recognition.

There is no evidence in this case of the flagrant type of anti-union activity, including domination of a company union, active interference with the rights of employes in collective bargaining, discrimination, strikes, and the like, which permeates the decisions relied on by the Board. The record shows that Swift & Company, at its Jersey City plant and elsewhere, has been bargaining collectively with the United Packinghouse Workers of America as the representative of the overwhelming majority of its employes. The union's representation of these employes in the company's Jersey City plant resulted from two consent elections, the second of which was conducted pursuant to an agreement between the company and the very local involved in the present case, which agreement was executed on the day the Union filed its representation petition in this case.

But the **Machinists** Case and the **Franks Bros.** Case are even more clearly distinguishable from the present case on another ground not present in many of the other decisions cited in the footnote at page 22 of this brief. Both these cases involved solely complaint proceedings under Section

10 (b) of the Act and not, as in the present case, a representation proceeding under Section 9 (c) followed by a complaint proceeding occasioned solely by the petitioner's declared intention of testing the legality of the Board's unit determination. In the **Machinists** Case, where the employer had actively aided one union (A. F. L.) and thwarted another (U. A. W.) which had had a majority, the Board found, as it has in a multitude of cases, that no effect should be given to dissipation of the majority held by the unfavored union and that the company must bargain with that union even without an election ever having been held. The Board in fact dismissed as unnecessary a petition for certification filed by U. A. W. under section 9 (c) of the Act. Mr. Justice Douglas in his opinion (311 U. S. at p. 82) stressed this distinguishing factor.

In the **Franks Bros.** Case, the procedure was similar to that in the **Machinists** Case, as the statement of facts by this Court shows (321 U. S. at 702-703). The employer engaged in active anti-union activity immediately after consenting to an election. The union thereupon withdrew its prior petition for an election and filed charges with the Board, out of which a complaint proceeding arose. The Board held, as it uniformly has, that the employer who was guilty of anti-union activity which caused the dissipation of the union's majority had to bargain with the union even without an election. This, again was a run-of-the-mill decision on a run-of-the-mill situation, and admittedly was heard by the Court only because of an alleged conflict with **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240 (1939).

The **Franks Bros.** Case differs from the present situation not only because of the absence from our case of any anti-union activity by the company, but also because the present case is in an entirely different category, involving as it does a representation hearing on the question of the appropriateness of the unit sought by the Union and a sub-

sequent complaint proceeding necessitated by the procedure set forth in the Act to test the validity of the Board's unit determination.

The Court below cited decisions of two other Circuit Courts of Appeal, both of which are also distinguishable from the present case.

In **Semi-Steel Casting Company of St. Louis v. National Labor Relations Board,** 160 F. (2d) 388 (C. C. A. 8th, 1947), while it is true that the employer's sole unfair labor practice was a refusal to bargain in order to contest the validity of a Board election, the Court pointed out that "the evidence adduced by the company did not establish the fact, but only the probability, of the loss of the union's majority status" (160 F. (2d) at 392). Anything further in the Court's opinion was purely *obiter dictum* and, in any event, a mistaken application of decisions of this Court already distinguished.

In **National Labor Relations Board v. Central Dispensary & Emergency Hospital,** 145 F. (2d) 852 (App. D. C., 1944), where again the employer's sole unfair labor practice was a refusal to bargain in order to test the validity of the Board's certification, the only evidence of the union's loss of majority sought to be adduced by the employer was that only a relatively small portion of the employes eligible to vote in the prior election were still employed. Here again there was no proof of loss of a majority by the union, but only a surmise. Several other cases cited by the Board to the Court below, are distinguishable on similar grounds.**

By way of contrast, the loss of majority status in the present case is admitted by the Board and is treated as

** **Colorado Fuel & Iron Corporation v. National Labor Relations Board,** 121 F. (2d) 165 (C. C. A. 10th, 1941); **National Labor Relations Board v. Federbush Co., Inc.,** 121 F. (2d) 954 (C. C. A. 2d, 1941); **National Labor Relations Board v. Highland Park Mfg. Co.,** 110 F. (2d) 632 (C. C. A. 4th, 1940); **National Labor Relations Board v. Biles-Coleman Lumber Co.,** 96 F. (2d) 197 (C. C. A. 9th, 1938).

proved under the order of the Court below on petitioner's motion to adduce additional evidence.

To the extent that the Court in the **Central Dispensary** Case relied on this Court's decision in the **Franks Bros.** Case, *supra,* it is submitted that that Court, like the Court below, fell into error for the reasons already discussed.

Accordingly, none of the decisions relied upon by the Court below,—and, indeed, none of the many cited by the Board in its several briefs,—either controls the present situation or is even relevant to the facts now before this Court. The permissible scope of this brief does not allow further argument to establish this contention, but petitioner is prepared to demonstrate the inapplicability of any published decision of our courts, except one, which we will now proceed briefly to discuss.

B.

National Labor Relations Board v. Inter-City Advertising Co., Inc., 154 F. (2d) 244 (C. C. A. 4th, 1946), Is the Only Decision Properly Applicable to the Present Case.

In a substantial number of cases, courts have taken cognizance of the possible or actual loss of majority status after a lapse of a long period of time, and have refused to enforce an order compelling the employer to bargain with the union until the status of the union as representative of the employes was redetermined.***

*** See, e. g., **National Labor Relations Board v. National Licorice Co.**, 104 F. (2d) 655 (C. C. A. 2d, 1939), affirmed, as modified on other grounds, in **National Licorice Co. v. National Labor Relations Board**, 309 U. S. 350 (1940), where this Court noted that the Board did "not complain" of the Court's remand to the Board (p. 359); **National Labor Relations Board v. American Mfg. Co.**, 106 F. (2d) 61 (C. C. A. 2d, 1939), affirmed as modified on other grounds, 309 U. S. 629 (1940); **National Labor Relations Board v. Karp Metal Products Co.**, 134 F. (2d) 954 (C. C. A. 2d, 1943), cert. denied, 322 U. S. 728 (1944); **National Labor Relations Board v. Goodyear Tire & Rubber Co. of Alabama**, 129 F. (2d) 661 (C. C. A. 5th, 1942), cert. denied, 319 U. S. 776 (1943); **Stewart Die Casting Corporation v. National Labor Relations Board**, 114 F. (2d) 849 (C. C. A. 7th, 1940), cert. denied, 312 U. S. 680 (1941).

However, no case is so close to the situation here presented as the **Inter-City Advertising** Case. In that case, the Board, on May 12, 1944, certified the union as the bargaining agent of the company's transmitter technicians, excluding the employes at the company's radio studio. There, as here, the company promptly announced its refusal to bargain in order to test the reasonableness of the separate classification of transmitter technicians, and, as in our case, this was the employer's sole alleged unfair labor practice.

Between July 1, 1944, and September 23, 1944, in the normal course of business, one of the four transmitter technicians was discharged and another was replaced. This left three persons in the unit, two of whom testified they were not in favor of the union. The Board ordered the company to bargain with the union, despite the testimony by all three employes that the company's conduct had not affected their feeling with regard to the union.

Thus the situation was almost identical to that existing in our case.

The Court in the **Inter-City** Case distinguished a number of Supreme Court and Circuit Court cases, including many of those distinguished herein, on the following grounds (all of which are applicable to the case now under consideration):

1. There was no aggressive campaign against the union and no intimidation of workers.

2. There was no room for the presumption that the decline in union membership was due to the employer's refusal to bargain.

3. There was no room for the presumption that the union's loss of majority was due to unfair labor practices.

4. There was no ground for applying the rule that a certification of bargaining representatives must be maintained for a reasonable time on the ground that it would

be impracticable to hold frequent elections upon every shift of sentiment of the employes.

5. In this case, the union's loss of majority came from a change in personnel made in the normal course of business and the company had not interfered with or coerced its employes.

The Court, therefore, denied the Board's petition for enforcement. In the course of his opinion, Judge Soper stated (p. 245):

> "• • • It follows that when a union majority has been dissipated without fault on the part of the employer the union no longer possesses the authority to speak for the employees and an order of the Board that requires the employer to bargain with the union cannot be enforced. The order of the Board now under consideration cannot be approved [on] the ground stated in its opinion, that the order is necessary to effectuate the policy of the Act, for **it is clear that the order will defeat the prime purpose of the statute to lodge the bargaining power of the workers in the hands of their chosen representatives.** This end cannot be subordinated merely to uphold the power and prestige of the Board." (Emphasis supplied.)

Judge Dobie dissented, although he felt that the matter was "not altogether free of doubt" (p. 248), and "the final result may seem somewhat anomalous or unusual" (p. 249).

Rehearing was denied on May 7, 1946 (unreported). The Board did not apply to this Court for a writ of certiorari.

The Board's efforts to distinguish the **Inter-City** Case were not accepted by the Court below. Instead, the Court clearly recognized the conflict between its decision and that

of the Circuit Court of Appeals for the Fourth Circuit, stating (R. 283):

> "• • • we are not in accord with the majority view in the Inter-City case and agree instead with the views expressed by Judge Dobie in his dissenting opinion."

The **Inter-City** Case stands alone only in that it is the first time the facts there present arose. It is not contrary to the holdings or the reasoning of the authoritative cases in the field, some of which we have discussed.

In the present case, the facts, if anything, are stronger than those in the **Inter-City** Case. Free from any interference or pressure by the company, 80% of the employes in the alleged unit, in the exercise of the right guaranteed to them by the National Labor Relations Act, to determine for themselves who, if anyone, shall represent them for purposes of collective bargaining, have voluntarily and spontaneously requested, in the only manner they could think of,—by direct appeal to the company,—that they not be represented by any union in their relationship with the company. We respectfully submit that, in the face of this expression of their desires, to compel these employes to be represented by a union which won an election two and one-half years earlier, would be to negate and stultify the very purpose for which the National Labor Relations Act was passed.

If an employer bargains collectively with a union which is not the free choice of his employes, he is held guilty of an unfair labor practice,—and rightfully so.

It is no more proper to require the company to bargain collectively with a union as the representative of a group of its employes despite a written statement by 80% of these employes that they do not desire such representation, where a majority of these employes and of the whole unit were never accorded an opportunity to vote.

C.

Petitioner Should Not Be Penalized for Adopting a Procedure Permitted by the Act.

The Court below apparently considered very significant the fact that petitioner did not seek review of the Board's order under Section 10 (f) of the Act but instead abided the Board's determination whether to petition the Court for enforcement under Section 10 (e) of the Act, which the Board did not do for more than a year after issuance of its order.

It is respectfully submitted that the Court below erred in construing the pertinent provisions of the National Labor Relations Act.

In the first place, there is, of course, no longer any question that a Board's direction of election or certification of representation is not reviewable by a Court since it is not a final order. **American Federation of Labor et al. v. National Labor Relations Board,** 308 U. S. 401 (1940).

Accordingly, petitioner is clearly correct in its position that the only method whereby it could secure judicial review of the Board's unit determination in the representation proceeding was by refusing to bargain following the election held by the Board and awaiting a complaint proceeding and an order of the Board based thereon.

The election in this case was held May 24, 1944. The Union was certified June 5, 1944. In his Intermediate Report of April 6, 1945, the Trial Examiner found that petitioner refused to bargain with the Union on June 16, 1944, on November 16, 1944, and thereafter. The Board's order was not issued until August 31, 1945. Accordingly, for the period of over 14 months from June 16, 1944 to August 31, 1945, even under the view of the Court below, petitioner

cannot be criticized for refusing to bargain with the Union as the sole method of testing the Board's unit determination.

Upon issuance of the Board's order, two alternative, parallel methods of bringing the order before the Circuit Court of Appeals for review were available. The first method, set forth in the Act under Section 10 (e), is for the Board to petition the Court for enforcement of its order. The second method, set forth in Section 10 (f) of the Act, is for the employer or any other person aggrieved by a final order of the Board to apply to the Circuit Court of Appeals for review of the order.

There is nothing in the Act or in its legislative history indicating any circumstances under which these two methods of obtaining review of the Board's order are not completely parallel or under which one must be preferred to the other.

In the present case, petitioner had made clear its position as to the unit sought by the Union at the representation hearing on February 16, 1944, and at every stage of the proceeding thereafter. Neither the Union nor the Board was in any doubt as to the company's position. In the company's letter of November 16, 1944, to the United States Conciliation Service, a copy of which was sent to the Union (R. 158-159), the company again stated its position and the reason for its refusal to bargain.

In light of these facts, it is submitted that the company was justified in adopting the alternative of awaiting a petition by the Board for enforcement of its order.

It is unthinkable that a party to a legal proceeding should be penalized for adopting one of two optional methods of procedure afforded it by an Act of Congress.

The Board's petition for enforcement of its order was filed on September 12, 1946, slightly over a year after issuance of its order. The company's answer was filed on October 2, 1946. The communication signed by 20 of 25 employes involved was received on November 14, 1946. On November 25, 1946, the company promptly brought this communication to the attention of the Court below by a motion to adduce additional evidence,—the only method available to it.

It is respectfully submitted that the company's procedural conduct,—like its labor relations conduct,—was above reproach in this case. It was within the Board's power to seek enforcement of its order promptly or to delay. It delayed for a year.

The Court below apparently relied upon **National Labor Relations Board v. Central Dispensary & Emergency Hospital,** 145 F. (2d) 852 (App. D. C. 1944) for its view on this point. It is respectfully submitted that the United States Court of Appeals for the District of Columbia erred in this regard as did the Court below.

D.

Conclusion.

Section 1 of the National Labor Relations Act (29 U. S. C. A. sec. 151) provides, in part:

> "It is hereby declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce * * * by protecting the exercise by workers of full freedom of association, self-organization, and **designation of representatives of their own choosing,** for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. * * * " (Emphasis supplied.)

Section 7 of the Act (29 U. S. C. A. sec. 157) guarantees to employes the right "to bargain collectively **through representatives of their own choosing.**" (Emphasis supplied.)

It is now established that neither the Union certified by the Board nor any union is the choice of a majority of the employes in the unit here involved. Twenty of the 25 persons employed in the unit have stated they do not desire to be represented by a union. Thirteen of these persons, who constitute a majority of the employes in the unit, neither voted in the election nor ever have had an opportunity to do so. Accordingly, as to these 13, the communication received from the employes is, in effect, a request for an opportunity to exercise, **for the first time**, the right of self-determination as to their representation for purposes of collective bargaining which is guaranteed them by the Act.

The remaining 7 employes who signed the communication have changed their minds,—2½ years after the election,—as to their representatives for collective bargaining purposes. Certainly such a change of mind cannot be considered hasty or impetuous.

There is no hint or suspicion in this case of any exercise of influence by the company in so far as the communication from the employes is concerned or, indeed, in so far as the Union's loss of majority is concerned.

Accordingly, enforcement of the Board's order would require the company to bargain collectively for these employes with a Union **not** "of their own choosing" but directly opposed to their wishes. It would stultify the most basic purpose of the Act. Certainly the Congress never intended or even contemplated this result.

It is submitted that the decision of the United States Circuit Court of Appeals for the Fourth Circuit in **National Labor Relations Board v. Inter-City Advertising Co., Inc.,**

154 F. (2d) 254 (1946), which is directly opposed to the decision of the Court below, states the correct rule applicable to the case here presented.

Therefore, it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that a writ of certiorari should be issued.

Respectfully submitted,

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